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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WELLS FARGO BANK, N.A.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In determining the scope of damages payable by the United States for breach of contract, did the Court of Appeals for the Federal Circuit err, and contravene prior holdings of this Court, by excusing the United States from liability for foreseeable consequential damages that are routinely imposed in breach-of-contract actions against private parties?

2. In denying breach-of-contract damages because proof of loss of the profits that would have occurred in the absence of the breach "necessarily involves a highly speculative and conjectural injury," did the Court of Appeals for the Federal Circuit contravene decisions of this Court by allowing the breaching party to benefit from the uncertainty caused by the breach?

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PETITION FOR A WRIT OF CERTIORARI

Wells Fargo Bank, N.A.,[1] petitions this Court for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Federal Circuit in the present case.

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 88 F.3d 1012 (1996). The opinions of the Court of Federal Claims are reported at 26 Cl. Ct. 805 (1992) and 33 Fed. Cl. 233 (1995).

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[1] Pursuant to this Court's Rule 29.6: the parent company of Wells Fargo Bank is Wells Fargo & Company; its non-wholly owned subsidiaries include First Interstate Residential Mortgage, L.L.C., First Interstate Tower, and Wells Fargo HSBC Trade Bank, N.A.

JURISDICTION

The decision and judgment of the Court of Appeals were issued on July 2, 1996. Pet. App. 1a-26a. Rehearing was denied on September 11, 1996. Pet. App. 60a. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In the 1970s and early 1980s, Congress required the federal government to institute programs offering federal guarantees of repayment of loans to startup companies that produced ethanol. Pet. App. 2a-5a. Banks would otherwise not make such loans because the economic viability of ethanol was uncertain, and good banking practices would not allow banks to bear the risks associated with such loans. Pet. App. 2a, 46a, 75a-76a.[2] By reducing the risk to private lenders by issuing guarantees, the federal government sought to spur the construction and development of ethanol facilities and receive the benefits of decreased dependence on imported oil and increased rural employment. Pet. App. 2a, 4a.

1. *The Regulatory Consequences of a Bank's Making a High Risk Loan Without a Guarantee.*

In addition to the risk of the borrower's default, federal banking regulation imposes further, severe consequences on banks making risky loans, such as a loan to a startup ethanol producer. Banking regulation imposes those consequences immediately, without waiting to see whether the loan ultimately is paid off, because from the point of view of banking regulation (and sound banking practices),

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[2] In addition to the usual risks associated with a startup company, a construction loan to an ethanol producer entails an unhedgeable risk. The profitability of ethanol depends on the relative prices of two independently fluctuating commodities (corn, from which ethanol is made, and crude oil). *See* Pet. App. 5a.

where a loan is risky a bank should not have made it, regardless of whether the bank ultimately succeeds in collecting that loan. Pet. App. 28a-32a; 46a-48a.

The consequences of making loans that are too risky have to do with the basics of banking. In general, banks make money by leveraging their capital; each dollar of capital will support about 14 or 15 dollars of loans. The money loaned comes from deposits, and to insure that the depositors' money will not be lost (and that the government, as insuror of deposits, will not have to pay the depositors for such losses), federal banking regulations and sound banking practices impose limits on the quality and amount of loans or other assets a bank can hold relative to every dollar of the bank's capital. Pet. App. 24a-32a; 46a-48a.

If a bank has made a loan that has too great a risk of non-collection, federal banking regulations and sound banking practices force it to protect the bank's deposits by, among other things, "charging off" all or a portion of the risky loan from the bank's books. Pet. App. 30a-31a. The effect of a charge-off is to require a portion of the bank's capital to stand behind the risky loan on a dollar-for-dollar basis, preventing that capital from being leveraged to support other loans. Pet. App. 31a. Thus a charge-off greatly reduces the total amount of lending that the bank can make, by a factor of 14 or 15 to one. A high-risk loan must also be placed on "non-accrual status," meaning that interest received on the loan cannot be taken as income. *Id.* This also limits the bank's capital and its ability to support other loans, because net income goes to increase the bank's capital. *Id.*

These regulatory consequences limit the bank's profitability to a greater extent than the bank could hope to recoup from the repayment of the risky loan. *See* Pet. App. 28a-32a; 48a-54a. Thus these consequences are a significant disincentive to the banks, causing them to avoid making loans that would be questioned by bank examin-

ers. As the government's banking witness testified, no bank would make a loan if there were a prospect of an immediate charge-off, regardless of the bank's view of the prospect of obtaining repayment. Trial Tr. 1505 (Greene).

2. *The Government's Program Induces Wells Fargo to Lend to a Startup Ethanol Facility by Promising a Guarantee.*

The United States administered its loan guarantee program through the Department of Agriculture (USDA) and its sub-agency, the Farmers Home Administration (FmHA). It issued "Conditional Commitments" that the federal government would guarantee repayment of 90 percent of construction loans for ethanol plants, provided that the borrower and the lending bank fulfilled the terms therein listed. Pet. App. 2a-6a, 62a.

In June 1982, American Gasohol Refiners, Inc. (which later changed its name to High Plains[3]) and Mid-Kansas Savings and Loan of Wichita, Kansas, applied for a 90 per cent loan guarantee on a $20 million loan for the construction of a fuel ethanol plant in Colwich, Kansas. Pet. App. 5a-6a, 62a. (Wells Fargo supplied the actual funds and was later formally substituted for Mid-Kansas on the Conditional Commitment.) The government issued a Conditional Commitment in October 1982, containing various conditions. Pet. App. 6a, 62a.

In December 1982, Wells Fargo agreed to finance High Plains's construction of the proposed ethanol plant. The plant was built and began production in 1984, but Wells Fargo and High Plains determined that a modification costing $3.5 million would be necessary to get the plant running to full capacity. Pet. App. 6a, 63a.

Wells Fargo was reluctant to advance these additional (and not to be guaranteed) funds without assurance that if the plant reached adequate production levels, the guar-

[3] We will use the name High Plains throughout for convenience.

antee would be issued. The bank therefore entered into negotiations with FmHA personnel (the FmHA employees were themselves "seasoned and sophisticated bankers," Pet. App. 53a), and High Plains regarding the terms and conditions of any additional lending. Pet. App. 63a-64a.

In September 1985, Wells Fargo, High Plains, the FmHA, and other interested parties executed an Intercreditor Agreement setting out the terms and conditions under which the additional financing would be advanced by Wells Fargo. Pet. App. 7a, 63a-64a. The Intercreditor Agreement also reaffirmed that the government would issue the guarantee as soon as the bank complied with the conditions of the Commitment and the government's regulations. Pet. App. 7a, 64a. Wells Fargo was formally substituted as lead lender under the Conditional Commitment in 1986. Pet. App. 7a, 64a.

3. *The USDA Breaks Its Promise to Issue the Guarantee.*

With the injection of the new financing, High Plains resolved its production problems and operated at above the specified capacity.

Nonetheless, the FmHA refused to issue the guarantee. At first it insisted that Wells Fargo provide High Plains with additional "working capital loans." Notwithstanding Wells's belief that each of the conditions precedent to the issuance of the guarantee had already been satisfied and that High Plains did not need additional working capital, Wells Fargo offered to provide High Plains an additional $5 million line of credit, to be used if needed.[4] Pet. App. 8a, 66a. Agency documents, internal and external, stated explicitly that the government was satisfied with the bank's response and that it then intended to issue the guarantee. Pet. App. 8a, 67a.

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[4] Wells Fargo was correct that this new financing requested by FmHA was unnecessary. High Plains succeeded without any additional financing.

On the day of closing, however, FmHA officials notified Wells Fargo that the government would not issue the guarantee.

Wells Fargo then followed administrative appeal procedures. The hearing officer, who was the FmHA's Louisiana State Director, heard the appeal in May 1987. Pet. App. 68a. While he refused to overturn the FmHA's determination, he did suggest the FmHA reconsider issuing the loan guarantee. *Id.* The FmHA Administrator refused to reconsider the decision. *Id.*

On January 22, 1988, Wells Fargo instituted this litigation.

4. *The Denial of the Guarantee Forces Wells Fargo to Take Charges to Its Capital.*

After the denial of the guarantee, Wells Fargo was left holding $32.7 million in high risk loans (the initial $20 million loan plus other sums advanced to High Plains), none of which it would have made absent the inducement of the guarantee program. Pet. App. 33a. Without the prospect of a guarantee, Wells Fargo restructured the loans, accepting an equity interest in High Plains in return for debt that exceeded the amount of the $20 million loan that was to have been guaranteed. Pet. App. 8a, 33a.

Federal bank examiners also noticed the absence of prospects of a guarantee. They forced Wells Fargo to make charges to its capital for the doubtful collectibility of the High Plains loan. They initially insisted that the bank charge off the entire amount. Pet. App. 32a-33a. After negotiations with the examiners, Wells Fargo successfully persuaded them to back off from that initial demand, but was nevertheless forced to charge off $6.7 million on December 30, 1988, and then an additional $3 million on March 15, 1989. Pet. App. 33a. This meant that $9.7 million of the bank's capital had to stand behind the High Plains loan, rather than be available to be leveraged to

support more than $140 million in other loans. Pet. App. 35a. Wells Fargo had the lending opportunities to make such additional loans if this capital had been available. Pet. App. 35a n.4, 53a-54a.

The High Plains loan also had to be placed on non-accrual, non-cash status, which meant that interest received on the loan could not be taken as income when received. Pet. App. 36a. Because a bank's income increases its capital, the loss of income during this period also shrank the bank's capital lending base compared to what it would have been in the absence of a breach. *Id.* Had the government issued its guarantee, there would have been no need for the charge-offs and the loan would not have been placed on non-accrual status. Pet. App. 58a.

To reduce any need for further charge-offs (by reducing the "bank balance" of the unguaranteed loan), in May 1989, Wells Fargo sold, for $2.5 million, the equity in High Plains that it had acquired in the restructuring. Pet. App. 33a-38a. High Plains thereafter continued to make regular principal and interest payments, and, when cash flow permitted, excess cash flow payments. *Id.* In March 1990, the bank balance was paid down to zero, and all subsequent payments made by High Plains (both principal and interest) were booked as income to the bank. Pet. App. 36a.

By March 1993, High Plains had been profitable for a number of years and was, for the first time, in a position to conduct a public stock offering that could retire its debt to Wells Fargo. On the eve of the offering, however, it appeared that the proceeds, while substantial, would fall short of the $18 million needed to pay off the bank. To avoid re-registration and delay of the offering, Wells Fargo was forced to agree that if the offering yielded at least $17.5 million, all amounts received would be paid to Wells Fargo in satisfaction of 100 per cent of High Plains's obligation, even if that amount was less than the balance owed to Wells Fargo on the loan. Pet. App. 34a-35a.

As predicted, the offering was a success, but somewhat short of the amount owed to the bank. The net proceeds of the sale were paid to Wells Fargo, but the outstanding customer balance of the loan was $389,423 greater than those proceeds. *Id.*

5. *The Court of Federal Claims Holds the Government Liable for Breach of Contract.*

On July 21, 1992, on cross motions for summary judgment Chief Judge Smith of the United States Court of Federal Claims held that the Conditional Commitment and the Intercreditor Agreement were both contracts that the government had breached when, after Wells Fargo met each of the terms and conditions of the conditional commitment, the government still refused to issue the guarantee. Pet. App. 85a. He held that the government's interpretation of the contract was unreasonable and that other reasons offered by the government for its refusal to issue the guarantee were "at best disingenuous" and "ring[ing] hollow." Pet. App. 81a-84a.

6. *After a Trial on Damages, the Court of Federal Claims Awards Wells Fargo Lost Profits Caused by the Charge-Offs and Non-Accrual Status of the Loan.*

By the time the issue of damages went to trial, High Plains had conducted its public offering and paid back most of the principal and interest that remained due (all but the $389,423 that Wells Fargo had had to forgive in order to assure that the stock sale could be held). In addition to this amount, the court considered (1) what damage the bank suffered as a result of the regulatory impact imposed because Wells Fargo was holding the unguaranteed, high risk loan and (2) whether the federal government could be held liable for those damages.

The government argued that even if Wells Fargo had been damaged by the charge-offs and non-accrual status of the High Plains loan, the United States could not be

held liable for those damages. The government asserted that, as a matter of law, private parties may not recover lost profits on injury to their "core business" or "unrelated business transactions" that is caused by the government's breach of contract. The government asserted that such losses are legally deemed to be unavailable because "consequential and remote." *Defendant's Post Trial Brief* at 18-22.

Wells Fargo responded that there was no such rule that lost profits on business transactions with others could be denied as a matter of law, and that "[t]he true concept of consequential damages involves consideration of the type of loss foreseeable by the contracting parties at the time of their agreement." *Plaintiff's Reply to Defendant's Post Trial Brief* at 1-3 (quoting *Gardner Displays Co. v. United States*, 346 F.2d 585, 589 (Ct. Cl. 1965)).

Wells Fargo further contended that the loss of capital caused by the charge-offs and the non-accrual status of the loan were foreseeable to the government (which regulates banks and, the Court of Federal Claims found, had "seasoned and sophisticated bankers" negotiating its contracts with Wells Fargo), and that the damages caused by the loss of capital to Wells's lending business flowed directly, unavoidably, and predictably from that loss. *Plaintiff's Post Trial Brief* at 28-33; *Plaintiff's Reply to Defendant's Post Trial Brief* at 3-5.

The Court of Federal Claims agreed with Wells Fargo's position. By opinion dated April 11, 1995, Pet. App. 27a-58a, that court awarded Wells Fargo (1) $389,423.86 to compensate the bank for the amount that the bank forgave to be able to obtain the proceeds from the public offering, an amount that would have been guaranteed had the government not breached its contract, and (2) $10,496,000.00 in lost profits that Wells Fargo would have earned (based on the bank's historic rates of return) on the capital that the bank was unable to leverage as a

result of the two charge-offs and the placing of the loan on non-accrual status.[5]

The Court of Federal Claims rejected the government's argument that lost profits on "unrelated business transactions" may never be allowed. Instead, the court read the case law cited by the government (a series of Court of Claims and Federal Circuit cases in which lost profits from unrelated business transactions were denied) as having been decided on foreseeability grounds. The trial court held:

> The Court finds that Wells has met the standard of the *Hadley v. Baxendale* rule on foreseeability of lost profits. The sole purpose of the FmHA program was to alleviate the very type of risk of loss that occurred in this case. The effect of the charge-offs and the loan's non-accrual status (i.e., inability to book interest as income when received) were clearly foreseeable in this case due to the nature of the FmHA's loan guarantee program, and the regulated nature of the banking industry. The government's argument to the contrary is not credible. It is not disputed that the individuals involved on both sides of the transaction were seasoned and sophisticated bankers. Moreover, these damages are not dependent on the success or failure of High Plains as a going concern. Without a guarantee on the High Plains loan, capital losses were automatic regardless of High Plains payment history. From the outset, the threat of capital losses —and their ramifications—hung over this transaction

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[5] Wells Fargo had also claimed that it lost $26,264,000 when, in order to further reduce the bank balance on the unguaranteed loan, it sold its warrants in High Plains in 1989, rather than in the 1993 public offering when it otherwise would have. Pet. App. 33a-38a. The Court refused to award these losses on the grounds that they were unforeseeable and uncertain of proof, but did note that this result was "somewhat harsh" and that to truly make Wells whole might require an additional $10 million award (representing the amount of debt that Wells forgave in exchange for the warrants). Pet. App. 54a-58a.

> like the sword of Damocles. This is precisely why Wells sought the FmHA Guarantee, and precisely why FmHA was in the business of issuing such guarantees. In short, the court holds that the lost capital damages claimed by Wells were foreseeable at the time of contracting, and that there was no intervening causal step between the government's breach and the damages claimed by Wells. . . . Accordingly, the court will award Wells $10,496,000.00 in lost capital damages.

Pet. App. 52a-54a (citations omitted).

The government appealed the decision to the United States Court of Appeals for the Federal Circuit, where it repeated its argument that the losses arising out of the charge-offs and the non-accrual status of the High Plains loan should not have been awarded because "the Court of Claims [and its successor have] held . . . that lost profits from subsequent business transactions as a result of capital losses from the breached contract are not recoverable *as a matter of law.*" *Principal Brief of the United States* at 34 (emphasis added). The government asserted that the Court of Federal Claims had erred by considering such matters as the foreseeability of the loss from injury to capital, the purpose of the loan guarantee program, and the interests the contract sought to protect. *Id.* at 34-39. Wells Fargo cross-appealed for the damages arising out of the sale of its equity interest in High Plains. *See* footnote 5, above.

7. *The Federal Circuit Partially Reverses, Holding that Lost Profits on "Unrelated Business Transactions" are Always, as a Matter of Law, Too Remote and Consequential to be Recovered from the United States.*

The Federal Circuit agreed with the trial court that the Conditional Commitment and the Intercreditor Agreement were contracts; that the government had breached those contracts when it refused to issue the guarantee; that

Wells Fargo could be awarded the $389,423 that the bank forgave in exchange for the proceeds of the public offering; and that Wells could not be awarded any amount to compensate the bank for having sold its equity in 1989 to reduce the bank balance of the loan.

However, the Federal Circuit disagreed with and reversed the Court of Federal Claims on whether the United States could be held liable for the $10,496,000 of lost profits on the lending activity that the bank was prevented from engaging in by the charge-offs. The Federal Circuit held that, as a matter of law, Wells Fargo could not recover any damages for the losses to the bank's lending business as a result of the charge-offs and non-accrual status of the High Plains loan because such lending would constitute "unrelated business transactions."

The Federal Circuit did not question the method of calculating the damages. Instead, the court of appeals took issue with the Court of Federal Claims's reading of earlier Federal Circuit and Court of Claims decisions denying recovery of lost profits on unrelated business transactions as being based on foreseeability grounds. Pet. App. 22a.

Holding that it "approach[ed] the question differently," *id.*, the Federal Circuit held that in a breach of contract claim against the United States, general losses to the private party's business are deemed "remote and consequential" without any inquiry into whether such assumptions are reasonable in light of the specific facts of the case or whether these losses on so-called "unrelated business transactions" were reasonably foreseeable or within the actual or reasonable contemplation of the parties at the time of contracting.

Quoting *Ramsey v. United States,* 101 F. Supp. 353, 357-58 (Ct. Cl. 1951) (which quoted *Myerle v. United States,* 33 Ct. Cl. 1, 26 (1897)), the reasoning of which

it found "equally applicable to the present case," the Federal Circuit stated:

> The profits lost from the corporation's over-all business activities, because of its shortage of capital allegedly occasioned by the Government's failure to pay the contract amounts when due, may not be recovered either. It is important to bear in mind that the corporation's claim is not for the anticipated profits of the contracts in question, but is a claim for the anticipated profits of its entire business enterprise. The lost profits of these collateral undertakings, which the corporation was unable to carry out, are too remote to be classified as a natural result of the Government's delay in payment. . . . "[T]here is a distinction by which all question[s] of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages, to be recovered against the delinquent party upon a breach of the agreement. . . . But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit."

Pet. App. 20a.

The Federal Circuit further implied that damage claims against the United States are subject to a more rigorous standard than similar claims against private parties. Quoting its decision in *Northern Helex Co. v. United States,* 524 F.2d 707, 720 (Ct. Cl. 1975), the Court stated that "remote and consequential damages are not recoverable in a common-law suit for breach of contract . . . *especially . . . in suits against the United States for the recovery of common-law damages,* such as the instant case." Pet. App. 18a (emphasis added).

On August 15, 1996, Wells Fargo petitioned the Federal Circuit for rehearing and suggested that the rehearing be en banc. The petition was denied on September 11, 1996.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision raises a question fundamental to the determination of damages payable by the United States when it has breached a contract. The Federal Circuit here imposed a unique rule, excusing the United States from liability for major elements of damages for which a private breaching party would be liable in other American courts. Where the United States is the wrongdoer, whether the law of damages may depart so saliently from that generally applicable to private parties is an important question that repeatedly arises and should be decided by this Court.

The question is all the more important because this Court has held, at least since *United States v. Bank of the Metropolis,* 15 Pet. (40 U.S.) 377, 392 (1841), and most recently in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), that when the United States enters into contracts, "its rights and duties therein are governed by the law applicable to private individuals." *Id.* at 2464-65 (plurality opinion) (quoting *Lynch v. United States,* 292 U.S. 571, 579 (1934)); *see also* concurring opinion at 2478-79. The Federal Circuit's holding not only is inconsistent with, but also undermines, those holdings of this Court, because the Federal Circuit's holding reduces the liability of the United States as breaching party to an empty formality, as the result herein shows. Although Wells Fargo was the technical victor below, it is left without a remedy for the vast majority of damage caused by the breach. Even though Wells Fargo fully performed, it is much worse off than it would have been in the absence of the breach—or if it had never dealt with the FmHA in the first place. Moreover, while the United States is

technically responsible for its breach, the Federal Circuit limited the damage remedy so that the cost of breaching is no greater than what the cost of performance would have been. Thus, the Federal Circuit's holding leaves the United States free to breach its contracts with impunity, with no greater exposure than if it performed.

I. THE FEDERAL CIRCUIT'S RULE DEPARTS FROM OTHERWISE UNIVERSALLY APPLIED DOCTRINE.

The trial court (the Court of Federal Claims), after extended scholarly analysis (Pet. App. 28a-45a), held that the federal government should be liable for all damage to Wells Fargo caused by the breach that had been foreseeable at the time of contracting. In so holding, the trial court was in accord with the law as generally applied in the United States. *E.g.*, Restatement (Second) of Contracts § 351 (1981); 5 Arthur Linton Corbin, *Corbin on Contracts* § 1006 (2d ed. 1964) ("Our only test of 'causation' . . . is foreseeability, based upon uniformity of sequence in our experience.")

In reversing, the Federal Circuit applied a different, and unique, rule. Rejecting the trial court's conclusion that the foreseeability test governed the allowability of damages, the Federal Circuit held that it "approach[ed] the question differently . . . ." Pet. App. 22a. Instead, the Federal Circuit "refused to award damages for profits lost on transactions not directly related to the contract that was breached." Pet. App. 19a. It held that Wells Fargo's loss of a part of its lending business was "too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach. . . ." Pet. App. 21a.[6]

[6] It is clear that the Federal Circuit made this determination as a matter of law, rather than weighing the validity of the Court of Federal Claims's factfindings and the supporting evidence on the foreseeability of the loss. The court of appeals did not mention, much less evaluate, any of the extensive factfindings or evidence on the subject of the foreseeability of damage or the extent of the

That the Federal Circuit's holding is contrary to the rule applied in other courts is plain. Other courts hold that damages from injury to independent or collateral undertakings are recoverable where they were legally foreseeable at the time of contracting—the very standard applied by the Court of Federal Claims and rejected by the Federal Circuit. *E.g., Independent Mechanical Contractors, Inc. v. Gordon T. Burke & Sons, Inc.*, 635 A.2d 487 (N.H. 1993) (subcontractor's recovery against general contractor includes damages for lost profits on other jobs where foreseeable); *Mechanical Wholesale, Inc. v. Universal-Rundle Corp.*, 432 F.2d 228, 231 (5th Cir. 1970) (plumbing manufacturer breached promise to guarantee its wholesaler's performance; damages awarded under Texas law for lost profits on other jobs as well as the job in question);[7] *Delano Growers' Coop. Winery v. Supreme Wine Co.*, 473 N.E.2d 1066, 1075-76 (Mass. 1985) (for delivery of substandard wine, buyer's damages compensate for general loss of business in addition to loss of profit on substandard wine itself; same rule applies

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injury. Indeed, at this point in its opinion, in referring to injury in its lending business that Wells Fargo suffered from the charge-offs, the Federal Circuit referred to profits on loans that Wells Fargo "*allegedly* would have made . . ." if the charge-offs had not been required. Pet. App. at 20a (emphasis added). By use of the term "allegedly," rather than by referring to evidence or facts found, the court appears to have concluded that the evidence was irrelevant and that, regardless of the facts, such a loss is legally insufficient. *Cf.* Fed. R. Civ. P. 12(b)(6).

[7] *Accord State of Texas v. Buckner Constr. Co.*, 704 S.W.2d 837, 845 (Tex. App. 1985) (where State of Texas breached contract with bridge painter, causing it to lose money on other contracts, damages available where such other losses were foreseeable); *see Childress v. Cook*, 245 F.2d 798, 806 (5th Cir. 1957) (Texas law permits damages even for future profits, "whether the profits are expected from the actual contract breached or from a collateral agreement, though in the latter case there must be some showing . . . that these expected profits were within defendant's contemplation.").

in UCC and non-UCC cases); *Downey, Inc. v. Bradley Ctr. Corp.*, 524 N.W.2d 915 (Wis. Ct. App. 1994) (subcontractor obtains damages from general contractor for foreseeable losses on other unrelated projects where breach required plaintiff to take resources away from other sites); *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 832 (D.C. 1972) (breach of contract to supply heating equipment; foreseeable damages for counterclaimant's resulting loss of retail business allowed); *see Kentucky Consumers Oil Co. v. General Bonded Warehousing Corp.*, 184 S.W.2d 972, 974 (Ky. Ct. App. 1945) (Kentucky law; "Loss of profits growing out of an existing collateral or subordinate agreement may be recovered where they were within the contemplation of the parties when the original contract was made . . ." (quotations omitted)).

In sum, outside of Federal Circuit decisions, we are not aware of any decision or rule that there can never be damages for losses to "independent and collateral undertakings," even if foreseeable, and that court's statement that such damages are not allowed at common law (Pet. App. 18a) is inaccurate.[8] *See, e.g., Toltec Fabrics,*

[8] Indeed, it has never been accurate. First, as Professor McCormick points out, with few exceptions the original rule at common law was that the breaching party was liable for all damages caused by the breach, whether foreseeable or not. Charles McCormick, *Handbook on the Law of Damages* § 138 at 563-64 (1935). The holding in *Hadley v. Baxendale*, 9 Exch. 341 (1854), narrowed this rule so that only foreseeable damages caused by the breach could be recovered. *Id.; see* Pet. App. 39a.

Moreover, the Court of Claims, predecessor to the Federal Circuit, recognized 45 years ago that its rule limiting contract damages was not in accord with the law applying to private parties in the United States generally. In *Ramsey v. United States*, 101 F. Supp. 353 (Ct. Cl. 1951) (damages cannot include loss of general business caused by government's breach of obligation to make timely payments), the Court of Claims explicitly rejected without explanation the opportunity to follow the general law that it recognized as applying in "numerous State courts . . . ." 101 F. Supp. at 357 n.1. Neither then nor subsequently has the court explained this de-

Inc. v. August Inc., 29 F.3d 778 (2d Cir. 1994) (under New York law, damage to loss of reputation and goodwill, including loss of future sales of other than the defective products, permitted in breach of contract action, but on the facts there presented, that loss was not established).

Scholarly authorities are fully in accord. Section 347 of the Restatement (Second) of Contracts is directly contrary to the Federal Circuit's analysis. That section provides that the injured party's contract damages include just what the Federal Circuit has excluded:

> (a) loss in the value to [the injured party] of the other party's performance caused by its failure or deficiency, *plus*
>
> (b) *any other loss, including incidental or consequential loss,* caused by the breach . . . .

(emphasis added).[9]

II. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.

By rejecting application of the otherwise universal rule of the measure of damages in contract actions, the Federal Circuit's decision conflicts with this Court's holdings and should be reviewed by this Court. *Winstar v. United States; Perry v. United States,* 294 U.S. 330, 435 (1935) ("When the United States, with constitutional authority,

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parture, other than to say that its limitation on damages applied "at common law" and applies "especially . . . in suits against the United States." *Northern Helex Co. v. United States,* 524 F.2d at 720.

[9] Further showing that the Restatement contemplates damages of exactly the sort excluded by the Federal Circuit opinion, Comment (a) to Section 347 provides that benefit-of-the-bargain damages are not sufficient by themselves where such damages "cannot adequately compensate the injured party for his disappointed expectation *as, for example, where a delay in performance has caused him to miss an invaluable opportunity.*" (Emphasis added.)

makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference . . . except that the United States cannot be sued without its consent."); *United States v. Bostwick*, 94 U.S. 53, 66 (1877) ("the United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf"); *Cooke v. United States*, 91 U.S. 389, 398 (1875) (when the United States "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there"); *United States v. Bank of the Metropolis.*

It may be argued that this Court's decisions concern issues of liability but not the measure of damages for a breach, but that fact actually increases the importance of this case. A holding of liability has little meaning if the damages available are not sufficient to compensate for the loss. Unless the measure of damages fully compensates the injured plaintiff, the usefulness of the breach-of-contract remedy diminishes, the incentive to breach increases, and the reluctance of parties to enter into contracts increases. As Professor Corbin notes:

> A second purpose in the giving of damages . . . is the prevention of similar harms in the future. The fact that damages must be paid tends directly to the prevention of breaches of contract. It makes, therefore, for the security of business transactions and helps to make possible the vast structure of credit, upon which so large a part of our modern prosperity depends.

5 *Corbin on Contracts* § 1002 at 33-34. Thus the holding of the Federal Circuit limiting damages undermines the effectiveness of this Court's holdings on liability.

Indeed, this Court's holdings have been prompted by the same concern over the decline in usefulness and availability

of contracts to the federal government that would result from allowing the government to be shielded from the law of contracts as otherwise generally applied. In *Bank of the Metropolis,* for example, the Court held that because the United States itself "daily and unavoidably use[s] . . . commercial paper . . . [it is] as much interested as the community at large can be, in maintaining [the principles of commercial transactions]." 15 Pet. at 392. In *Winstar,* the plurality opinion observed that the United States has a "long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." 116 S. Ct. at 2459.

In the present case, while Wells Fargo has prevailed on liability and recovered some damages, the liability of the government is only a technicality. The sum that Wells Fargo recovered ($389,423) is less than one twenty-fifth of its injury. This failure to recover what it could routinely recover under a private contract can only decrease Wells Fargo's, or any bank's, appetite to be induced by the government to participate further in similar loan guarantee programs,[10] and generally reduce the willingness of private parties to enter into contracts with the government.

III. THE FEDERAL CIRCUIT'S DECISION WILL NOT SERVE ITS PURPOSE OF LIMITING THE UNITED STATES' COSTS OF CONTRACTING.

The Federal Circuit decision all but admits its goal of creating a rule particularly favorable to the United States as defendant. Quoting *Northern Helex Co. v. United States,* 524 F.2d 707, 720 (Ct. Cl. 1975), the Federal Circuit states that "remote and consequential damages are not recoverable in a common-law suit for breach of

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[10] Wells Fargo's Vice Chairman testified at trial that, as a result of the government's breach, Wells Fargo greatly cut back on the areas in which it would participate in federal government loan guarantee programs. Trial Tr. at 487 (Gillfillan).

contract . . . *especially* . . . *in suits against the United States.*" Pet. App. 18a (emphasis added). It would appear that the basis for this special rule is to save the United States money.

Such savings do not result, however. In *Winstar*, the Court pointed out that "expanding the Government's opportunities for contractual abrogation" would have the certain result of "undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." 116 S. Ct. at 2459 (plurality opinion). The same effect would occur from diminishing damages to a level that does not compensate for loss caused by the breach. Therefore, the Federal Circuit's special rule to benefit the Government ultimately saves it nothing and reduces the number of persons willing to deal with it. (*See* footnote 10, above.)

IV. THE FEDERAL CIRCUIT'S DECISION ALLOWS THE UNITED STATES TO BENEFIT FROM ITS OWN BREACH.

As an additional ground for denying damages, the Federal Circuit held that determining what would have happened if there had been no breach "*necessarily* involves a highly speculative and conjectural injury." Pet. App. 18a (emphasis added).

This is fundamental error, directly contradictory to decisions of this Court, which alone warrants certiorari. Any uncertainty as to what would have happened if there had been no breach was created by the breach itself. Thus to deny damages on that basis is to reward the wrongdoer for committing its wrong. For that reason, this Court has held that "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). When the fact of damages has been proved, the

extent or amount of that damage is left to reasonable inference. *E.g., Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931). The Court of Federal Claims made extensive factfindings based on a mass of evidence concerning Wells Fargo's actual experience. Indeed, the government "[did] not seriously challenge the bulk of the economic or statistical methodology used by Wells' expert" at trial, Pet. App. 51a, or on appeal. The Federal Circuit's dismissal of this evidence as "necessarily . . . highly speculative" is flatly contrary to law, erects insuperable barriers to the proof of damages by injured parties, and allows the government to escape responsibility for its own wrong.

V. THE RESULT IS UNFAIR.

A final reason for the grant of certiorari is the decidedly unfair and lopsided result that this case has brought about. The wrongdoer, the federal government, has obtained all of the benefit it sought from the promise of a loan guarantee—it induced a bank to make a high-risk loan that it would not ordinarily have made, resulting in a successful, operating ethanol refinery—at a cost no greater than if it had kept to its promise rather than breaking it. Wells Fargo, the performing, innocent, non-breaching party, has wrongfully been forced to hold a low-quality loan that, it is undisputed, the bank would never voluntarily have made, resulting in charge-offs (forced by the federal government's own bank examiners) costing it millions of dollars.

In short, the effect of the Federal Circuit's holding is that the breaching, non-performing party gets everything it bargained for, and the innocent, performing party gets a $10 million loss.

This Court should review such a result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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